

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEDEDIAH W. REGENWETHER,

Defendant.

No. CR 00-3048-MWB

**ORDER REGARDING  
GOVERNMENT'S MOTION IN  
LIMINE**

***I. INTRODUCTION AND BACKGROUND***

On October 27, 2000, a five-count indictment was returned against defendant Jedediah W. Regenwether charging him with two counts of bank robbery, in violation of 18 U.S.C. § 2113(a), two counts of solicitation of a crime of violence, in violation of 18 U.S.C. § 373(a), and conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371. Trial in this case is scheduled to commence on May 21, 2001. The charges in this case arise out of defendant Regenwether's alleged involvement in three bank robberies that were committed in September, October, and November of 1999 (collectively, "the 1999 robberies" unless otherwise indicated).<sup>1</sup> On April 26, 2001, the government filed its motion

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<sup>1</sup>The 1999 robberies encompass the September 30, 1999, robbery of the Security State Bank in Radcliffe, Iowa, the robbery of the Brenton Bank in Ames, Iowa, on October 1, 1999, and the November 10, 1999, robbery of the First American State Bank in Fort Dodge, Iowa. The government contends that following his arrest for the robbery of the Boone County Community Credit Union on March 13, 1998, and while still incarcerated for that crime in a half-way house, defendant Regenwether met Michael Kirk. The government further contends that Regenwether and Kirk planned all three of the 1999 robberies, and in  
(continued...)

in limine. In its motion in limine, the government seeks to offer evidence of defendant Regenwether's involvement in three bank robberies that occurred in January and March of 1998 (collectively, "the 1998 robberies" unless otherwise indicated).<sup>2</sup> The government contends that evidence of defendant Regenwether's involvement in the 1998 robberies constitutes "intrinsic" evidence of defendant Regenwether's involvement in the offenses charged in this case. The government also argues that evidence of defendant Regenwether's involvement in the 1998 robberies is admissible under Federal Rule of Evidence 404(b) to show proof of identity. Defendant Regenwether has filed a timely response to the government's motion. Defendant Regenwether argues that the evidence of his involvement in the 1998 robberies does not constitute intrinsic evidence. He further argues that the probative value of this evidence's is substantially outweighed by its prejudicial value and thus is inadmissible under Rule 404(b).

## ***II. LEGAL ANALYSIS***

### ***A. Intrinsic Evidence***

As noted above, the government contends that evidence of defendant Regenwether's involvement in the 1998 robberies constitutes intrinsic evidence of the charged offenses here. The Eighth Circuit Court of Appeals has instructed that

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<sup>1</sup>(...continued)  
each of these robberies Kirk entered the bank and passed a demand note to a teller.

<sup>2</sup>The 1998 robberies encompass the robberies of the Nationsbank in Duncanville, Texas, on January 24, 1998, and March 7, 1998, and the robbery of the Boone County Community Credit Union on March 13, 1998. The government asserts that each of these robberies were committed by defendant Regenwether and Vincent Abney. The government contends that in each of these robberies Abney entered the bank and passed a demand note to a teller while Regenwether acted as the driver of the getaway vehicle. The government states in its motion that it may seek to offer the testimony of Abney at trial.

evidence of other crimes is admissible for the purpose of providing the context in which the crime occurred. We have sometimes called this evidence "res gestae" or "intrinsic" evidence. *United States v. Moore*, 735 F.2d 289, 292 (8th Cir. 1984). We have explained that when "evidence of other crimes is 'so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances thereof; or tends logically to prove any element of the crime charged,' it is admissible as an integral part of the immediate context of the crime charged." *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.) (quoting *United States v. Derring*, 592 F.2d 1003, 1007 (8th Cir. 1979)), *cert. denied*, 479 U.S. 869, 107 S. Ct. 233, 93 L. Ed.2d 159 (1986).

*United States v. Forcelle*, 86 F.3d 838, 841 (8th Cir. 1996) (footnote omitted). "Rule 404(b) governs the admission into evidence of 'other crimes, wrongs, or acts.' The rule applies only to 'extrinsic' and not to 'intrinsic' evidence." *United States v. Swinton*, 75 F.3d 374, 377 (8th Cir. 1986); *see United States v. O'Dell*, 204 F.3d 829, 833 (8th Cir. 2000); *United States v. Billingsley*, 160 F.3d 502, 505 (8th Cir. 1998); *United States v. Heidebur*, 122 F.3d 577, 579 (8th Cir. 1997); *United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994); *United States v. Oakie*, 12 F.3d 1436, 1441-42 (8th Cir. 1993); *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.), *cert. denied sub nom. Price v. United States*, 479 U.S. 869 (1986); *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

Here, the government asserts that the evidence about the 1998 robberies constitutes an integral part of the operative facts of the 1999 robberies and as such constitutes intrinsic evidence. As the Eighth Circuit Court of Appeals pointed out in *Forcelle*:

In those cases in which we have approved the use of other crimes evidence as an integral part of the context of the crime charged, the other crime evidence was closely or inextricably intertwined with the charged crime. *See, e.g., United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994) (evidence of drug delivery "inextricably intertwined" with the conspiracy charge),

*cert. denied*, --- U.S. ---, 115 S. Ct. 763, 130 L. Ed.2d 660 (1995); *Bass*, 794 F.2d at 1313 (evidence was "closely intertwined with the entire criminal transaction"). We have often explained the other crime evidence "completes the story" or provides a "total picture" of the charged crime. *See, e.g., Ball*, 868 F.2d at 988 (evidence gave jury a "total picture" of defendant's state of mind).

*Forcelle*, 86 F.3d at 842.

Here, the court concludes that although the issue is close, the evidence concerning defendant Regenwether's involvement in the 1998 robberies is intrinsic to the crimes charged in the indictment because the 1998 robberies are inextricably intertwined with the current charges. Before he was arrested and convicted for the March 13, 1998, robbery of the Boone County Community Credit Union, defendant Regenwether discussed and planned the robbery of the Security State Bank in Radcliffe with James Olszewski. These alleged actions form the basis for part of the conspiracy charge found in Count 5 of the Indictment.<sup>3</sup>

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<sup>3</sup>Count 5 of the Indictment lists defendant Regenwether's discussion with Olszewski as one of the overt acts:

(a) On March 31, 1998, JEDEDIAH W. REGENWETHER took James Paul Olszewski to the Security State Bank in Radcliffe, Iowa, to show Olszewski the bank and explain his plan to rob the bank, and persuade Olszewski to help him rob the bank.

(b) On March 31, 1998, REGENWETHER went with Olszewski to the Wal-Mart store in Ames, Iowa, and purchased a can of spray paint for use in painting a plastic toy squirt gun which REGENWETHER planned to use to rob the Security State Bank in Radcliffe, Iowa.

(c) On April 1, 1998, REGENWETHER met with Olszewski at a park in Boone, Iowa, to discuss REGENWETHER's plan for he and Olszewski to rob the Security State Bank in Radcliffe, Iowa. While at the park,

(continued...)

Moreover, the government asserts that defendant Regenwether used his involvement in the 1998 robberies to recruit Olszewski and Benjamin Michael Kirk to join the conspiracy to rob the Radcliffe bank. The government further asserts that defendant Regenwether used his involvement in the 1998 robberies to train Olszewski and Kirk in the art of bank robbery. Through these alleged actions the government proposes to prove elements of one of the counts of bank robbery, Count 1, and one of the counts of solicitation of a crime of violence, Count 2. Thus, the court finds that evidence of defendant Regenwether's involvement in the 1998 robberies is intrinsic to the crimes charged here and are admissible. Therefore, the government's Motion in Limine is **granted**.

***B. Rule 404(b)***

Having concluded that defendant Regenwether's involvement in the 1998 robberies is admissible as intrinsic evidence, the court need not consider whether such evidence is admissible under Federal Rule of Evidence 404(b). Nonetheless, assuming *arguendo* that evidence of Regenwether's involvement in the 1998 robberies is not intrinsic evidence, but extrinsic evidence, the court will consider the question of whether this evidence is admissible under Rule 404(b). Federal Rule of Evidence 404(b) "governs the admission into evidence of 'other crimes, wrongs, or acts.' The rule applies only to 'extrinsic' and not to 'intrinsic' evidence." *United States v. Swinton*, 75 F.3d 374, 377 (8th Cir. 1986); see *O'Dell*, 204 F.3d at 833; *United States v. Oakie*, 12 F.3d 1436, 1441-42 (8th Cir. 1993); *United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994); *United States v. Bass*, 794 F.2d

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<sup>3</sup>(...continued)

REGENWETHER gave Olszewski additional details of his plan to rob the bank, and explained to Olszewski how to avoid getting caught after robbing the bank.

1305, 1312 (8th Cir.), *cert. denied sub nom. Price v. United States*, 479 U.S. 869 (1986); *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

“Rule 404(b) is a rule of inclusion, permitting admission of other crimes evidence unless the evidence tends to prove only the defendant's criminal disposition.” *United States v. Campa-Fabela*, 210 F.3d 837, 840 (8th Cir. 2000); *see United States v. Dobynes*, 905 F.2d 1192, 1195 (8th Cir. 1990). As the Eighth Circuit Court of Appeals has instructed: “[e]vidence of prior bad acts is not admissible under Rule 404(b) ‘solely to prove the defendant's criminal disposition,’ *United States v. Shoffner*, 71 F.3d 1429, 1432 (8th Cir. 1995), but is admissible to show ‘proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *United States v. Hardy*, 224 F.3d 752, 756-57 (8th Cir. 2000); *accord Forcelle*, 86 F.3d at 843 (noting that Rule 404(b) “allows the use of evidence about ‘other crimes, wrongs, or acts’ if it has a bearing on any relevant issue other than the defendant's propensity toward criminal activity.”); *see United States v. Powell*, 39 F.3d 894, 896 (8th Cir. 1994); *United States v. Kern*, 12 F.3d 122, 124 (8th Cir. 1993). Here, the government is also offering the 1998 robbery evidence to prove identity.

The Eighth Circuit Court of Appeals has pointed out:

Other acts evidence is not excluded by Rule 404(b) if it is: (1) relevant to a material issue raised at trial; (2) similar in kind and close in time to the crime charged; (3) supported by sufficient evidence to support a jury finding that the defendant committed the other act; and (4) its probative value is not substantially outweighed by its prejudicial value.

*United States v. Heidebur*, 122 F.3d 577, 588 (8th Cir. 1997); *accord United States v. Rush*, 240 F.3d 729, 730 (8th Cir. 2001); *United States v. Green*, 151 F.3d 1111, 1113 (8th Cir. 1998); *United States v. Emmanuel*, 112 F.3d 977, 981 (8th Cir. 1997); *Forcelle*, 86 F.3d at 843; *United States v. Shoffner*, 71 F.3d 1429, 1432 (8th Cir. 1995); *United States v. DeAngelo*, 13 F.3d 1228, 1231 (8th Cir.), *cert. denied*, 512 U.S. 1224 (1994); *Kern*, 12 F.3d

at 124-25. The court will consider each of these four requirements *seriatim*.

**1. Relevance, Similarity, and Timeliness**

Here, the government argues that the 1998 robbery evidence is directly relevant to the issue of identity. In *United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000), the Eighth Circuit Court of Appeals instructed that:

In sum, in order to admit Rule 404(b) identity evidence on the signature facts or modus operandi theory, the District Court must make a threshold determination that, based solely on the evidence comparing the past acts and the charged offense, a reasonable juror could conclude that the same person committed both crimes. Two factors are relevant in analyzing the question. The first is the distinctiveness of the facts that make the crimes unique and the second is the proximity of the crimes in space and time.

*Id.* at 469. This threshold determination “is merely a distillation of the first two parts of the general test, as applied in the specific context of a modus operandi/identity case.” *Id.*

Here, the court finds the core facts of the 1998 Boone County Community Credit Union robbery and the 1999 robberies to be so distinctive as to make them unique. During all three 1998 robberies, Vincent Abney passed notes to bank tellers. The note that was used in the robbery of the Boone County Community Credit Union on March 13, 1998, read:

Please quickly hand over all  
100's, 50's, 20's & 10's  
No dye packs and no one will  
be hurt.

Gov't Ex. 1.<sup>4</sup> During the September 30, 1999, robbery of the Security State Bank in Radcliffe, Iowa, the note given by Kirk to the teller, which is virtually identical to the one used in the Boone robbery, read:

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<sup>4</sup>The government has not provided the court with copies of the notes used in the two 1998 robberies of the Nationsbank in Duncanville, Texas.

PLEASE QUICKLY HAND OVER ALL 100'S  
50'S, 20'S AND 10'S!!  
NO DYE PACKS AND  
NO ONE WILL BE HURT!!

Gov't Ex. 6. Likewise in the robbery of the Brenton Bank in Ames, Iowa, on October 1, 1999, Kirk handed the teller a note which read:

PLEASE QUICKLY HAND  
OVER ALL 100'S, 50'S, 20'S  
AND 10'S!! NO DYE PACKS  
AND NO ONE WILL BE HURT!!

Gov't Ex. 7. Similarly, during the November 10, 1999, robbery of the First American State Bank in Fort Dodge, Iowa, Kirk handed the bank teller a note which read:

PLEASE QUICKLY  
HAND OVER ALL  
100'S 50'S 20'S & 10'S  
NO DYE PACKS AND  
NO ONE WILL BE HURT

Gov't Ex. 8.

The language used in the four notes is identical. This is significant here because each note implores the teller to hand over money using the same adverb, "quickly," specifies the same four bill denominations that are being demanded, and warns about the use of dye packs. Moreover, the order of the bill denominations are the same in each note and each note contains the same grammatical mistake in which the possessive form rather than the plural form is employed in referencing the currency denominations being requested. Indeed, the only differences between the four notes lies in the use of ampersands, underscoring and exclamation marks. Based on the near identical nature and uniqueness of the demand notes, the court finds that a reasonable juror could conclude that the same person committed the 1998 Boone County Community Credit Union robbery and the 1999 robberies.



Because the government has not established the language of the notes used in the two 1998 robberies of the Nationsbank in Duncanville, Texas, the court can not draw the same conclusion with respect to those two robberies. The fact that a single robber entered the bank on each occasion and handed the teller a note demanding money while another robber stayed in the car to act as a getaway driver can hardly be deemed unique. Indeed, such an approach would seem to almost be the norm for such criminal conduct. *See United States v. Zamora*, 222 F.3d 756, 760 (10th Cir.) (bank robbery executed by two individuals in which one drove the getaway car while another was inside robbing the bank using a demand note), *cert. denied*, 121 S. Ct. 641 (2000); *United States v. Zelaya*, 114 F.3d 869, 870 (9th Cir. 1997) (same).<sup>5</sup>

The court further concludes that the closeness of the 1998 Boone County Community Credit Union robbery and the 1999 robberies, geographically and in time, supports the conclusion that these robberies are sufficiently related to allow an inference of identity.

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<sup>5</sup>The evidence of the Duncanville robberies is reminiscent of the evidence considered in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), in which the Fifth Circuit Court of Appeals specifically addressed which elements of an armed bank robbery might be considered distinctive, and which are merely generic. The Fifth Circuit Court of Appeals held that it was reversible error to admit other acts evidence to prove identity under Rule 404(b) where the charged and the uncharged acts had the following in common:

(1) both crimes were bank robberies, (2) perpetrated . . . between two and three o'clock in the afternoon. In both robberies the victimized bank was [3] located on the outskirts of a town, [4] adjacent to a major highway. In both robberies the participants [5] used a revolver, [6] furnished their own bag for carrying off the proceeds, and wore [7] gloves and [8] masks crudely fashioned from nylon stockings.

*Id.* at 1046. The Fifth Circuit Court of Appeals held that each of these eight factors "is a common component of armed bank robbery," and therefore the fact that those elements were present in both the charged and the uncharged robberies was not instructive. *Id.*

The court takes judicial notice of the fact that all four financial institutions which were the subject of the robberies are located within 62 miles of each other in central Iowa. Although the 1999 robberies were committed eighteen to twenty months after the Boone robbery, defendant Regenwether's incarceration immediately after the Boone robbery undercuts the significance of the length of the intervening period enough to permit an inference of identity. Accordingly, the court concludes that evidence of the 1998 Boone County Community Credit Union robbery is relevant to the issue of identity.

### **3. Sufficient evidence of other crime**

The third element for admissibility requires a showing sufficient to support a jury finding that defendant Regenwether committed the 1998 Boone County Community Credit Union robbery. See *Rush*, 240 F.3d at 730; *Green*, 151 F.3d at 1113; *Heidebur*, 122 F.3d at 578; *Forcelle*, 86 F.3d at 843; *Shoffner*, 71 F.3d at 1432; *Kern*, 12 F.3d at 124-25. In *United States v. Williams*, 895 F.2d 1202, 1205 (8th Cir. 1990), the Eighth Circuit Court of Appeals stated the standard to determine whether there was sufficient evidence to support a jury finding that the defendant committed the other crime:

The trial court neither makes a preliminary finding that the government has established the "other crimes" evidence by a preponderance, nor does it weigh credibility. Rather, the standard for admission of "other acts" evidence is whether the jury could reasonably find by a preponderance of the evidence that the act occurred and that the defendant was the actor. See *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 1501-02, 99 L. Ed. 2d 771 (1988); *United States v. Schleicher*, 862 F.2d 1320, 1322 & n.2. (8th Cir. 1988), *cert. denied*, 489 U.S. 1058, 109 S. Ct. 1326, 103 L. Ed. 2d 594 (1989).

*Id.* at 1205. Here, this standard is satisfied by defendant Regenwether's pleading guilty in the United States District Court for the Southern District of Iowa to the 1998 Boone County Community Credit Union robbery. See *Tomberlin*, 130 F.3d at 1320.

#### **4. Probative value**

The fourth element of proof for admissibility requires that the probative value of the evidence not be substantially outweighed by its prejudicial value. *See Rush*, 240 F.3d at 730; *Green*, 151 F.3d at 1113; *Heidebur*, 122 F.3d at 578; *Forcelle*, 86 F.3d at 843; *Shoffner*, 71 F.3d at 1432; *Kern*, 12 F.3d at 124-25. Although the court views this element as being a close question, the court concludes that the probative value of the 1998 Boone County Community Credit Union robbery evidence is not substantially outweighed by its prejudicial value.

Thus, the court concludes that the evidence of the 1998 Boone County Community Credit Union robbery is admissible under Rule 404(b) for the purpose of proving identity, but that evidence of the two 1998 robberies of the Nationsbank in Duncanville, Texas, is inadmissible under Rule 404(b) for the purpose of proving identity. However, during the course of trial should the government produce the demand notes used in the two 1998 robberies of the Nationsbank and should the court find those notes probative on the issue of identity, the court would be open to reexamining whether evidence of those robberies is alternatively admissible under Rule 404(b). Therefore, the court alternatively concludes that this portion of the government's motion is granted in part and denied in part.

### **III. CONCLUSION**

The court finds the evidence concerning defendant Regenwether's involvement in the 1998 robberies is intrinsic to the crimes charged in the indictment because the 1998 robberies are inextricably intertwined with the current charges. Thus, the court finds that evidence of defendant Regenwether's involvement in the 1998 robberies is admissible. Therefore, the government's Motion in Limine is **granted**.

**IT IS SO ORDERED.**

**DATED** this 11th day of May, 2001.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA